

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 03-10612-RWZ

ELIZABETH REZENDES

v.

JO ANNE BARNHART, Commissioner of
Social Security Administration

MEMORANDUM OF DECISION

March 17, 2004

ZOBEL, D.J.

On August 26, 1999, plaintiff Elizabeth Rezendes applied for disability as of October 28, 1997, for carpal tunnel syndrome, overuse syndrome, tendonitis, tendon tear/impingement of right shoulder and cervical disc disease with surgeries. The claim was denied initially and on reconsideration, and a hearing was subsequently held on December 6, 2000, in Providence, Rhode Island. On January 9, 2001, Administrative Law Judge ("ALJ") Lynette Diehl Lang found that plaintiff's assertions concerning her inability to work were credible, that her residual functional capacity for less than sedentary work was further reduced by chronic pain, and that, therefore, she was disabled and entitled to benefits. (R. at 95-99).

Subsequently, the Appeals Council, on its own motion, reviewed and vacated ALJ Lang's decision for the following reasons: (1) lack of substantial evidence to support plaintiff's disability, (2) insufficient evidence to evaluate the opinion of her treating physician, Dr. Craig van Horne, (3) lack of reasoning in the determination of her

credibility, and (4) inadequacy of the functional assessment of her ability to engage in work-related activity. On remand, the Appeals Council ordered the ALJ to: obtain more documentation from Dr. van Horne and all other treating sources, obtain a consultative orthopedic examination, and then evaluate the entire record and assess the plaintiff's ability to engage in work-related activity as well as her credibility in accordance with the regulations and rulings. (R. at 101-103).

Thereafter, another hearing was held on January 14, 2002, in Providence, Rhode Island before ALJ Barry Best, who found that plaintiff was not entitled to disability benefits. This decision was affirmed by the Appeals Council and became the decision of the Commissioner. Plaintiff appealed to this court and now moves to reverse the Commissioner's decision; defendant moves for an order affirming the decision.

Pursuant to 42 U.S.C. § 405(g), any individual may obtain review of a final administrative decision by a district court which "shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing." Rohrberg v. Apfel, 26 F. Supp. 2d 303, 305-6 (D. Mass. 1998). The Court must uphold the Commissioner's decision if it is supported by substantial evidence. Id. Substantial evidence exists "if a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support [the Commissioner's] decision." Rodriguez v. Sec'y of Health and Human Servs., 647 F.2d 218, 222 (1st Cir. 1981).

Furthermore, a determination that plaintiff is not credible must be supported by

substantial, specific, and relevant evidence. Musto v. Halter, 135 F. Supp. 2d 220, 227 (D. Mass. 2001). “An ALJ must consider a claimant’s subjective assertion of pain by examination of the following factors: (1) the nature, location, onset, duration, frequency, radiation, and intensity of pain; (2) any precipitating or aggravating factors; (3) the type, dosage, effectiveness, and adverse side effects of any pain medication; (4) any treatment, other than medication, for the relief of pain; (5) any functional restrictions; and (6) the claimant’s daily activities.” Rohrberg v. Apfel, 26 F. Supp. 2d 303, 308 (D. Mass. 1998) (finding that the ALJ erred as a matter of law by not examining claimant’s allegations of pain according to the enumerated factors); 20 C.F.R. § 404.1529.

In arguing that ALJ Best’s ruling is not supported by substantial evidence, plaintiff focuses solely on the finding that her assertions of pain were exaggerated. She contends that all of her examining physicians; namely, Dr. Burden, Brigham and Women’s Hospital Pain Center, Dr. Shapiro, and Dr. Miller, found that she has serious limitations, and her complaints of pain are consistent. In further support, she refers to ALJ Lang’s previous finding that plaintiff was credible and to the testimony of her neighbor, Mrs. Mary Ellen McGovern, who stated that she was trustworthy.

First, ALJ Lang’s determination concerning plaintiff’s credibility is irrelevant since the Appeals Council found that it failed to provide reasoning. In contrast, ALJ Best considered the enumerated factors when evaluating plaintiff’s credibility. The ALJ reiterated plaintiff’s testimony that she has “constant, unimproved, severe throbbing and burning pain from all the fingers radiating throughout both hands, arms, shoulders (particularly in the right, dominant, upper extremity) and into the neck.” (R. at 20). He listed the medications she takes and their side effects of stomach pains. He noted that

although plaintiff claims that any use of her hands or arms causes more pain, and she cannot “perform any prolonged handling, reaching, lifting, carrying, sitting, standing, or walking,” she can drive a car for short distances. (R. at 20). He pointed out that her ability to drive is significant since driving requires “the strength to open and close a car door; insert and turn key(s); hold and manipulate the steering wheel, operate a shift lever, turn signals, etc.; and move enough to see outside the vehicle in all directions, either directly or using mirror(s).” (R. 20 at n.2). He also observed that although she says she “can’t do anything. . .” in describing her daily activities, and her husband and four children must do all the household chores, she does try to feed and clean up after herself and she does get her six-year old child off to school. (R. at 20-21).¹ Notably, plaintiff admits that her testimony that she “can’t do anything” was “conversational hyperbole.” (Pl.’s Brief at 8).

As for plaintiff’s testimony regarding her constant pain, ALJ Best found that the asserted intensity of pain and degree of incapacity were inconsistent with the medical evidence in the record. More specifically, he found that “[t]he fact that the [plaintiff’s] own treating and examining physicians have indicated that she retains the ability to perform selective light duty is not consistent with the severe pain and degree of incapacity she alleged at the hearing.” (R. at 25). He observed that her treating physician, Dr. Craig van Horne, reported in September 1999 that plaintiff had only partial disability. (R. at 555). He noted that medical examiner, Dr. James Broome, found that she was not medically disabled and found that she could engage in light duty

¹ At the hearing, she said that her son “tries to get himself fixed and off to school.” (R. at 69).

work. (R. at 639). He also referred to her medical records at Morton Hospital and Medical Center and New England Baptist Hospital, which indicate that she was advised to stay out for work for limited periods of time or to work under modified conditions. (R. at 259-382, 399-440, 472-528).

Plaintiff's contention that examining physicians found that she had serious limitations and consistent complaints of pain misses the mark. The Social Security Act defines "disability" as an "inability to engage in substantial gainful activity by reason of any medically determinable physical or mental impairment which . . . can be expected to last for a continuous period of not less than 12 months" 42 U.S.C. § 416(i)(A). Instead of supporting her inability to work, two of the medical opinions she identifies (which the ALJ considered) suggest the opposite. In his orthopedic evaluation, Dr. C. Nason Burden opined that plaintiff's "pattern of complaint is largely that of symptomatic response to a considerable amount of surgery, resulting in anxiety and resulting in symptomology that is outside the sphere of objective findings from an orthopedic standpoint." (R. at 618). Significantly, Dr. Gilbert Shapiro stated that plaintiff has "work capabilities of a light duty nature and . . . she is not totally disabled." (R. at 634). The Brigham and Women's Hospital records plaintiff identifies shed no light on the issue. Finally, ALJ Best was entitled to give little weight to Dr. Steven Miller's opinion that plaintiff has "no significant work capacity," because, as he explained, it is inconsistent with the other evidence. (R. at 26).

Finally, ALJ Best noted that plaintiff's witness, Ms. Mary Ellen McGovern, admitted that she has not directly observed plaintiff's limited functioning, but was reporting what she heard from family members. (R. 21 at n.4). At the hearing,

Ms. McGovern stated that “I would say that I know of changes in [plaintiff’s] activity level more [from conversations with plaintiff’s husband] than I would have personally observed.” (R. at 78). Given the record, ALJ Best’s decision was supported by substantial evidence.

Accordingly, plaintiff’s motion is denied and defendant’s motion is allowed. Judgment may be entered affirming the decision of the Commissioner.

DATE

/s/ Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE